SUPREME COURT, U.S.
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97-372

In the Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES OF AMERICA, PETITIONER

v.

UNITED STATES SHOE CORPORATION, RESPONDENT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF AMICI CURIAE, ADDISON WESLEY LONGMAN, SILBOND CORPORATION, AND OTHERS LISTED ON INSIDE COVER, IN SUPPORT OF RESPONDENT

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39 pp

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IN SUPPORT OF RESPONDENT

AL ZAMIL CO., INC.
C&D TECHNOLOGIES
CREWS, INC.
DESERT WHALE JOJOBA CO., INC.
EXPORT TRANSPORTS, INC.
OCI INTERNATIONAL INC.
OVERSEAS OPERATIONS, INC.
SCHOTT GLASS TECHNOLOGIES, INC.
UNIVERSAL BUSINESS CORPORATION
W.A. BAUM CO., INC.

QUESTION PRESENTED

Whether the harbor maintenance tax established by 26 U.S.C. §4461 violates the Export Clause of the Constitution by taxing goods in export transit from States of the United States, so that the law is repugnant to the Constitution and, therefore, void.

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STATEMENT OF INTEREST

The law firm of Carlos Rodriguez & Associates represents a number of exporters in complaints challenging the harbor maintenance tax in the Court of International Trade. While these actions are stayed pending the outcome of the "test case," *United States v. United States Shoe Corporation*, now before this court, we aim to present the position of our exporter clients in opposition to the harbor maintenance tax and in support of the respondent.

Consent to file this *amicus curiae* brief was granted by the Solicitor General and counsel for respondent. Their consent letters will be filed with this brief.

Southern interests at the Constitutional Convention in 1787 first advanced the notion of exports free from the burden of taxation and gathered support from the North as well. Today, our clients are representative of the trade-oriented United States economy of 1998. They come from all regions of this country--East, West, Midwest, North and South. Most of them are small and medium-size companies. They share a common desire to end the harbor maintenance tax that has burdened their export shipments and enmeshed them in bureaucratic procedures, forms, and payments engendering added administrative expenses.

Just as trade was important to the newly formed nation at the time of the Constitution, the United States is now the largest exporting

and trading nation, and export trade remains vitally important.[1]

On behalf of our clients as *amici curiae*, we hereby present factual, legal, and historical reasons why this Court should affirm the ruling of the Federal Circuit Court and declare void the harbor maintenance tax law which violates the Export Clause of the Constitution.

SUMMARY OF ARGUMENT

The harbor maintenance tax, called a "tax" by Congress, which pursuant to the "Harbor Maintenance Revenue Act," represents a burden directly on goods in export transit in violation of the Export Clause, Art. I, § 9, Cl. 5.

There is no question here as in the recent case of *International Business Machines v. United States(IBM)*, 517 U.S. _____, 116 S.Ct. 1793 (1996), as to whether this tax affixes directly to the goods. It does. The Water Resources Development Act of 1986 required that the tax be imposed upon loading of cargo onto vessels in export trade. 26 U.S.C. §4461(a)(1)(A).

The government which created this measure as an excise tax, cannot establish more than 10 years after the fact that this is a "user fee." The government's brief stays carefully away from Supreme Court decisions broadly

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1 United Nations, *World Economic and Social Survey, 1997, Trends and Policies in the World Economy*, at 256; U.S. Department of Commerce, *Statistical Abstract of the United States* (October 1997) at 807; and *United Nations, Monthly Bulletin of Statistics* (Oct 1997) at 126-161.

interpreting the Export Clause. Instead their argument focuses on the pretext of a "user fee," which is presented as an exception to the Export Clause. But cases cited by the government, such as *Evansville-Vanderburgh A.A. Dist. v Delta Airlines, Inc.*, 405 U.S. 707 (1972), and *Massachusetts v. United States*, 435 U.S. 444 (1978), are not really Export Clause cases; they relate to the Import-Export Clause, Art. 10, Cl. 3, and the Commerce Clause, Art. I, §8, Cl. 3. These cases are not directly relevant.

What's more, the harbor maintenance tax does not really tax users. The vessels are the direct users, and sometimes these vessels arrive in port or depart empty of any cargo. That means that these ships would use harbor facilities without paying any tax which is imposed *ad valorem* on the value of the cargo. The exporters are not the users of the ports, and yet they are taxed.

In the congressional hearings on the Water Resources legislation, the House Committee on Merchant Marine and Fisheries acknowledged that the benefit of ports maintenance really goes to the entire population. H.R. Rep. 99-251, part 1 at 5.

Most importantly, this legislation has produced huge amounts of revenue--billions of dollars--that have not been spent for the benefit of harbors, ships, or exporters. These harbor maintenance funds remain in the Trust Fund and may be invested by the Department of Treasury. The tax produces an excessive amount of money in relation to the harbor maintenance needs, costs and benefits.

Moreover, this Court has decided an unbroken line of cases interpreting the Export

Clause broadly from *Marbury v. Madison* in 1803, though wartime periods during the Spanish American War and World War I, and extending to the most recent affirmation of a strong and broad export clause in *IBM, supra.*.

The court has reached out beyond taxes placed directly on export to invalidate taxes on bills of lading and other services and documents related to exporting to reaffirm a strong Export Clause policy. This history of case law is fully consistent with the constitutional history of the Export Clause. The record of the Constitutional Convention is clear that the framers would accept no exception to diminish the power and force of that clause.

Our clients in this matter are small and medium size exporting businesses that have filed complaints in the Court of International Trade to challenge the harbor maintenance tax. They share the same interest in protecting exports from burdensome taxation as the businesses during the colonial period did in protecting their exports from taxation. Recent articles on exporting cited in our argument indicate that smaller business enterprises are the most dynamic part of the export economy of the United States. Therefore these businesses stand to lose if the tax is allowed to remain in effect in violation of the Constitution.

ARGUMENT

I. INTRODUCTION: HARBOR MAINTENANCE TAX LAW IS A REVENUE MEASURE THAT BURDENS TRADE

The harbor maintenance tax imposed pursuant to 26 §4461 is a "tax" imposed directly on the goods in the course of export commerce, accruing at the time of loading cargo intended for export. After the vessel, its crew and cargo, there is little more essential to export trade than harbors from which to load goods and embark.

While the tax appears to be minuscule at a .125 percent *ad valorem* based on the value of cargoes exported, $2.7 billion was already collected from shippers by 1994, including $700 million in export taxes. *United States Shoe Corp. v. U.S.*, 114 F.3d (Fed. Cir. 1997). And if the court upholds this tax, there is no reason why larger and more burdensome taxes may not be imposed by Congress upon exported goods.

Revenues from exportation naturally have increased during the 10 years since the Water Resources Development Act went into effect in 1987. During this period, the United States has been and remains the leading exporting nation in the world,[2] and the value of this country's exports has nearly tripled from $223.4 billion in 1986 to $624.7 billion in 1996. The

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[2] United Nations, *World Economic and Social Survey, 1997, Trends and Policies in the World Economy*, at 256; U.S. Department of Commerce, *Statistical Abstract of the United States* (October 1997) at 807; and United Nations, *Monthly Bulletin of Statistics* (October 1997) at 126-161.

combination of tripling the tax rate from .04% to .125% in 1991 coupled with the nearly tripled value of exports have made this seemingly small tax into a powerful engine of revenue production. At 1996 levels of export trade, that should produce $780 million per year in harbor maintenance tax proceeds from exports in one year alone.

Statistics on U.S. exports from the first half of 1997 are continuing the trend of increasing, huge volumes of exports. The U.S. exported more than $340 billion during the first half of the year alone, indicating an annual rate of $680 billion in exports.[3]

II. THE EXPORT CLAUSE SHOULD BE READ BROADLY TO PROTECT EXPORTS FROM TAXATION.

A. Constitutional history

According to constitutional law history, the Southern representatives to the Constitutional Convention insisted upon an Export Clause prohibiting taxation of exports from the United States and protecting the South and its exports in particular. "It seems to be feared that the Northern States will oppress the trade of the South," said Mr. Langdon, a delegate from New Hampshire, according to *The Records of the Federal Convention of 1787* (volume 2), edited by Max Farrand. And the favorable vote

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[3] United Nations, *Monthly Bulletin of Statistics* (October 1997) at 160-161

for the Export Clause at the Constitutional Convention was part of the compromises between regional and sectoral interests that produced the finished document.

But it is clear from the history of the convention that northern delegates from Massachusetts and Connecticut and New Hampshire stood with the South. Together, they withstood any attacks on the proposed Export Clause so that the strength of that clause would not be restricted in cases where taxes were not required for the purpose of revenue, or when a two-thirds vote of Congress established that it was necessary to tax exports.

James Madison thought that export taxes might be needed in the future, particularly during periods of war when an embargo would be necessary. *Id.* at 361. But, it was argued that to tax exports would discourage industry in the United States. *Id.* at 360.

When the proposal was "no tax shall be laid on exports," the measure passed by 7-4. And the actual language of the Constitution was simple, unequivocal and strong in opposition to placing any taxes upon exports from this country:

> No tax or duty shall be laid on articles exported from any state.

In his analysis of the export clause, as it pertains to recent export controls, Yale law School note writer Bruce Ackerman commented:

> ...[T]he Clause could be viewed merely as prohibiting a particular form of taxation, instead of extending broad constitutional protection to the export trade. But the records reveal a larger purpose. In fact, the delegates voted down an amendment which would have banned only those export duties imposed for the purpose of revenue...In leaving the Export Clause in tact, the Convention reached a deliberate decision to prohibit the government from burdening the export trade in any way.

Note, *Constitutionality of Export Controls*, 76 Yale L.J. (1966) at 202.

Furthermore, the Export Clause should not be viewed as merely the product of parochial economic interest of the South expressed in the form of a political compromise. This was a measure, as the Yale Law Journal note writer points out and the Farrand records support, was advocated by Northern delegates who voted for the measure to protect their own states' exports from burdensome taxation. According to the *Records of the Federal Convention*, a delegate named Clymer "remarked that every State might reason with regard to its particular productions, in the same manner as the Southern States." *Records, supra*, at 363.

Why then, did the founding fathers limit the prohibition against export taxation to "taxes" and "duties" as described in Article I, § 9, Clause 5. The Yale note writer points out that there were no other export charges or taxes in use in

the colonies for the preceding 50 years. So maybe they weren't aware of user fees in 1787 at the time of the convention. But they had covered every type of tax, duty, or burden they were aware of in a simple sweeping clause designed to protect exports from any burden.

B. <u>Case law supports a strong, broadly interpreted Export Clause</u>.

While the founding fathers made it clear that they wanted a broad prohibition against export taxes that burdened export trade, the federal judiciary began to make a long line of decisions in which a broad interpretation of the Export Clause was applied over a period of nearly 200 years.

In one of the earliest interpretations, Justice John Marshall made it clear that a law that was contrary to the Export Clause was simply unconstitutional and void. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803):

> It is declared that 'no tax or duty shall be laid on articles exported from any State.' Suppose a duty on the export of cotton , of tobacco, or of flour; and a suit instituted to recover it. Ought judgment to be rendered in such a case? Ought the judges to close their eyes on the constitution and only see the law? *Marbury v. Madison, supra*, at 179

Marshall answered his question: "...a law repugnant to the Constitution is void." *Id.* at 180.

During the Gold Rush, the Court held that California's stamp duty on the export of gold, silver, and gold dust was a violation of the

Import-Export Clause of the Constitution, and the law was held void. *Almy v. State of California*, 165 U.S. (24 How. 169) (1860). But the stamp was not placed directly on the merchandise, it was placed on the bill of lading for the shipment. Justice Tawney held for the court that it didn't matter. He and the court viewed the matter the same as a tax on exports that was unconstitutional. *Id.* at 174-175.

Although the *Almy* case presented a question arising under Article I, §10, Clause 2 of the Constitution, Justice Tawney said in *dictum* that the issue was directly analogous to the Export Clause:

> And if the law of California is constitutional, then every cargo of every description exported from the United States may be made to pay an export duty to the State; provided it is in the form of a tax on a bill of lading, and this is in direct opposition to the plain and express prohibition in the Constitution of the United States.

Almy, supra, at 174.

Not only did the Supreme Court read the Export Clause broadly, the Court expanded the concepts of the Export Clause's prohibitions to incorporate a penumbra of activities surrounding exporting that must not be touched by taxation: *e.g.*, sale of goods to a broker buying goods for a foreign customer; insurance policies for risk to exported goods bought from a foreign insurance firm; the bills of lading pertaining to export transactions; and stamp tax on charter parties,

imposed during war time. In these cases the Court has repeatedly said that taxing various related aspects of exports is essentially the same as taxing the exports themselves. The following represent Supreme Court cases in which the Court spread out a penumbra of protection around the Export Clause:

' --*Thames and Mersey Marine Insurance Company v. United States*, 237 U.S. 19 (1915): The Court held that taxes in the form of stamp taxes upon marine insurance premiums for exports violated the Export Clause and constituted burdens upon goods in export trade. The Court framed the issue in this case as to whether the marine insurance was so "vitally connected" with exporting that the tax on such policies is essentially a tax upon the exportation itself." The court responded:

> The answer must be found in the actual course of trade; for exportation is a trade movement, and the exigencies of trade determine what is essential to the process of exporting. The avails of exports are usually obtained by drawing bills against the goods; these drafts must be accompanied by the bills of lading and policies or certificates of insurance. It is true that the bills of lading represent the goods, but the business of exporting requires not only contract of carriage, but appropriate provision for indemnity against marine risks during the voyage. The policy of insurance is universally recognized as

> one of the ordinary shipping documents."

Id. at 26.

Just in 1996, the U.S. government challenged this interpretation in the *IBM* case, *supra*, claiming that provision of services collateral to the exported goods themselves should not be precluded from taxation. The present Court rejected the government's argument and reaffirmed *Thames and Mersey*. *IBM* at 1804 and *passim*.

--*A.G. Spalding & Bros v. Edwards*, 262 U.S. 66, 43 S.Ct. 485, 67 L.Ed. 865 (1923): Justice Oliver Wendell Holmes, wrote for the Court that he considered sale of baseballs and bats to a broker buying goods for a foreign customer in Venezuela to be sufficiently related to exports from the United States that a tax could not be imposed on the products consistent with the Export Clause.

Justice Holmes said that it didn't matter that title had not passed to the buyer and that a bill of lading had not yet issued; nor did it matter that the sales tax in question was a general tax affecting merchandise not in export trade. While acknowledging that goods may be taxed in the course of manufacture and before export, he said that the key fact was that the baseball equipment had been delivered to the carrier. *Id.* at 262 U.S. 69-70, 43 S.Ct. 486.

It should be noted that in this case, as in others[4] , the Export Clause is enforced strictly and broadly notwithstanding that the tax upon sale of baseballs and bats was pursuant to the World War I measure, the War Revenue Act of October 3, 1917, 40 Stat. 300, 316. In short, the court is saying that notwithstanding the exigent needs of financing the war effort, the Export Clause was to be enforced. The need for rasing wartime funds through export taxation or such taxes imposed in relation to a military embargo was considered by those present at the constitutional convention in 1787, and the notion that there should be an exception for wartime to the Export Clause was simply rejected. Article I, § 9, Clause 5 had no wartime exception when it was first approved, nor does it now.

--*Fairbank v. United States*, 181 U.S. 283 (1901): In this case, the Court stated that beyond prohibited taxes directly upon exported goods, the Court would strike down taxes upon bills of lading related to export trade. This tax on exported goods was only 10 cents and was imposed in the form of a stamp duty. Justice Brewer for the Court decided that although this was called a "stamp." it was really a tax repugnant to Article I, §9, Clause 5 of the Constitution. The court declared:

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4 Other cases upholding the Export Clause strictly and broadly notwithstanding wartime conditions are: *United States v. Hvoslef, supra*, the War Revenue Act of June 13, 1898; and*Thames & Mersey Marine Insurance Company, supra*, the War Revenue Act of June 13, 1898.

> The requirement of the Constitution is that exports should be free from any governmental burden. The language is 'no tax or duty.'

Id. at 290.

The court reasoned, in part, that although a 10-cent stamp duty appears to be small, the stamps can come in larger denominations, and, furthermore, "The power to tax is the power to destroy," the Court said at 291, quoting John Marshall from *Brown v. Maryland*, 25 U.S.(12 Wheat.)419, 425, (1827): "A power to tax, this Court has emphatically said, is a power to destroy." *Id.* at 425.

In *dictum*, Justice Brewer said that an *ad valorem* tax on all exports would not be permitted under the Constitutional restriction. *Fairbank, supra*, at 292. "In other words,. the purpose of the restriction is that exportation, all exportation, shall be free from national burden." *Id.*

--*United States v. Hvoslef*, 237 U.S. 1, (1915): The Court held that stamp taxes imposed by the federal government upon charter parties (*i.e.* contracts for lease of vessels) related to export trade and was unconstitutional and void pursuant to Article I, §9, Clause 5. Justice Charles Evans Hughes spoke for the court as he observed that the Export Clause is more than just a protection against taxes laid directly on the goods in export transit:

> This constitutional freedom, however, plainly involves more than mere exemption from taxes or duties which are laid specifically upon the goods themselves. If it meant no more than that the obstructions to exportation, which it was the purpose to prevent, could readily be set up by legislation nominally conforming to the constitutional restriction but in effect overriding it.

Id. at 13.

However, the court has not expanded the Export Clause to include such pre-export activity as manufacturing these pre-export activities may be taxed even if the goods in question eventually enter the stream of export commerce. *Pace v. Burgess*, 92 U.S. 372, 376 (1875); and Turpin *v. Burgess*, 117 U.S. 504, 6 S.Ct. 835, 29 L.Ed. 988 (1886); *Cornell v. Coyne*, 192 U.S. 418, 24 S.Ct. 383, 48 L.Ed. 504 (1904). None of these cases, however, represents a contradiction to the broad interpretation of the Export Clause as discussed and cited above. Obviously, the exports in the *United States Shoe* case are not "pre-export activity," they are exports squarely in the stream of commerce.

The same broad reading and penumbral approach to the Export Clause employed since the early history of the Constitution has been employed recently in *United States v. International Business Machines(IBM)*, *517 U.S.* ___, 116 S.Ct. 1793, 135 L.Ed. 124 (1996) in which the court struck down a nondiscriminatory tax on exports in the form of taxing the insurance premiums paid to foreign insurers for the insurance protection of export goods.

The dissenters, Justices Kennedy and Ginsburg, argued vigorously that mere services

performed for the benefit of export activity should not receive the same constitutional protection under the Export Clause as given to taxes upon the exported goods in the stream of export commerce. *Id.* at 1804 *et seq.*

In the present case before the Supreme Court, the Harbor Maintenance tax falls directly on the goods in export transit. In fact the law states that exported goods become subject to the harbor maintenance tax upon loading for the purpose of exportation. 26 U.S.C. §4461. Therefore, the concern of those dissenting justices in *IBM* should not be a concern in *United States Shoe Corporation.*

The Supreme Court stated, "The point to guard against is the imposition of a duty under the pretext of fixing a fee." *Pace v. Burgess, supra,* at 376. And the court also advised that each case must be judged on its own circumstances.

The imposition of duty under the pretext of fee is exactly what we have in *United States Shoe Corporation:* Congress, describing its legislative creation as a tax, also described it as a user fee. 26 §4461 (a) and §4462(a) Congress acknowledged that in a trading country where most of the import and export trade comes through the ports, the general population benefits from harbor maintenance and dredging. H.R. Rep. No. 251,, 99th Cong., 1st Sess., part 1 at 5 (1985). Congress clearly stated that the vessels are the direct users of the ports and then proceeded to impose the "tax" on the exporters who do not use the ports? Is this a user fee, or is it really "a duty under the pretext of a fee," as described in *Pace v. Burgess, supra.?*

III. THE HARBOR MAINTENANCE TAX IS NOT A USER FEE, IT IS AN UNCONSTITUTIONAL TAX ON EXPORTS

A. The "harbor maintenance tax" is a tax

This measure was included in Public Law 99-662 (the Water Resources Development Act of 1986 under Title XIV of the Act, which is titled "Revenue Provisions." Under Section 1401 of that title, the law states, "This title may be cited as the "Harbor Maintenance Revenue Act of 1986."

The measure, passed by Congress in 1986, has proven to be a marvelous revenue raiser far beyond the needs of the government to contribute to the costs of harbor maintenance, improvements, construction, and dredging, as the bill was designed by Congress to do.

During the period this law and its 1990-1991 amendments have been in effect, the tax has more than tripled from .04% to .125 percent at a time when the exports of this country have nearly tripled. P.L. 99-662 § 1401 *et seq.* and P.L. 101-508, § 11214.

The government reports and projects dramatic increases in HMT revenues from in excess of 622 million in the 1994 fiscal year to a projected 790 million in the 1999 fiscal year with growth of net funds available in the Trust Fund expected to more than double from 1994 to 1999, with an estimated $2,183,805,000 available in the fund in that year, according to the *Third Annual Report to Congress on the Status of the Harbor Maintenance Trust Fund for Fiscal Year 1994* at 6 (Record at 140).

The Fund shows an actual surplus of funds over expenditures in fiscal 1994 of $452,360 while projecting a surplus in fiscal year 1999 of $1.66 billion. *Third Annual Report, supra,* at 5-6 (Record at 139-140).

The makers of the 1994 report indicate that they sincerely hope that Congress will pass new legislation designating the National Oceanic and Atmospheric Administration (NOAA) as a beneficiary of HMT trust funds to alleviate the growing surplus in the account. This is an admission by the government that its revenue raising for harbors is much more than is needed for that purpose, and other purposes need to be found to spend the funds. Record at 140-141.

Congress knew even during the committee hearings on the bill in 1985-86 that they had a constitutional problem on their hands, according to the statement of Congressman Jones of North Carolina submitted to the Committee of the Whole House. He quoted the Export Clause and added:

> Whether characterized as a tax or a fee, to the extent that such a levy is construed as primarily for the purpose of revenue raising, it is tantamount to a tax on export and in part unconstitutional.

H.R. Rep. No. 251, 99th Cong., 1st Sess., part 4 at 22-23 (1985) (Record at 101-102).

The Harbor Maintenance Trust Fund, created under Internal Revenue Code §9505 indicates that the fund commingles harbor maintenance tax revenues as well as monies raised by the St. Lawrence Seaway fund. 26 U.S.C. §9505(a)(1-2). And when the Water

Resources Development Act was first enacted in 1986, it provided for only 40% of funding for harbor maintenance project in a cost sharing program with state and local governments. P.L. 99-662 at 1401 *et seq.* This was later in 1991 increased to 100%. P.L. 101-508 §316. Some of these funds can be <u>invested</u> by the Secretary of the Treasury if they are not being actually used for harbor maintenance projects. Internal Revenue Code §9602(b)

Congress first labeled this measure a tax and the measure was placed in Chapter 36 of the Internal Revenue Code, Title 26 under "Certain Other Excise Taxes," Subchapter A, "harbor maintenance tax." The law states succinctly under the heading, "Imposition of tax," "There is hereby imposed a tax on any port use." The law continues, "The amount of the tax imposed by subsection (a) shall be an amount equal to 0.125 percent of the value of the commercial cargo involved."

Subsection (c) provides: "Liability and time of imposition of tax. (1) Liability. The tax imposed by subsection (a) shall be paid by..." The law further provides that "the tax imposed by subsection (a) shall be imposed in the case of cargo exported from the United States at the time of loading."

Hence this is a tax to be based on cargo loaded onto ships for export, in the stream of export commerce. The "tax" is referred to repeatedly in the law in creating exemptions from "tax," for example, for the United States 26 U.S.C. §4462 (e), and for cargo imported in bond for immediate exportation, 26 §4462(d) The law further states that the "tax" is imposed only once when cargo is unloaded and reloaded

onto the same vessel. 26 §4462(g)(1). In addition to the references quoted above, there are a number of other references in §§44612-4462 to the Congress's designation of this measure as a "tax."

Given that the United States Congress has been passing tax measures for more than 200 years, we submit that deference should be given to the Congress's designation of this measure as a "tax."

Congress in preparing and passing this legislation naturally believed this was a tax in the form of an involuntary contribution for the benefit of the general welfare, because the United States government as a whole had born these costs from the general revenues prior to the 1986 enactment of the harbor maintenance tax legislation. H.R. Rep. No. 99-251, part 1, *supra*, at 5.

U.S. legislation and supporting case law have defined "tax" many different ways over a long period of time and there are obviously many different types of taxes described and collected in this country. *E.g.*, this Court has treated the stamps placed upon bills of lading and charter parties as taxes, even though they may have been described as just "stamps." *Fairbank*, and *Hvoslef, supra*.

Given the history of this Court's interpretations of the Export Clause, any new tax measure that directly burdens export commerce, such as this HMT should be viewed with intense, heightened scrutiny.

Even the dissenters in the *IBM* case, supra, acknowledged, quoting from *Hvoslef, supra*, in part:

> 'The protections of the Export Clause must extend, perhaps, somewhat beyond specific taxes on goods, for "[i] f it meant no more than that, the obstructions to exportation which it was the purpose to prevent could readily be set up by legislation nominally conforming to the constitutional restriction but in effect overriding it.' *Hvoslef, supra*, at 13, S.Ct. at 463. As a result, the Court has found certain taxes to be proxies for taxes on the goods...

International Business Machines, supra, at 1812.

The term proxies used by Justice Kennedy sounds a lot like, "The point to guard against is the imposition of a duty under the pretext of fixing a fee," said by Justice Bradley in *Pace v. Burgess*. We submit that this is the very thing we ask this Court to guard against here because we contend that the so called "user fee" alleged here by the government is simply a tax wrapped in a pretextual or proxy label.

In passing legislation creating the Harbor Maintenance Tax and the related Trust Fund, Congress declared that the revenues and program would be administered by the Customs Service for collection of the tax. 26 §4461 (f) states that in administration and enforcement this tax shall be treated as a customs duty and the Customs Service is authorized to treat the "tax," as if such tax were a customs duty." *Id.*

Of course, a customs duty is a duty, which

is a type of tax imposed upon imported goods.[5] These are also known as "tariffs," which are taxes levied upon imported goods. Furthermore, these customs duties are charged *ad valorem* on the imported goods, precisely in the same manner that Congress charged the harbor maintenance tax *ad valorem* on exported goods. 26 U.S.C. §4461(b). Antidumping and countervailing duties are also *ad valorem* taxes on imports administered by the Customs Service. 19 U.S.C. §§1671(e), and 1673.

B. The harbor maintenance tax is not a user fee; it is a pretext for an unconstitutional tax.

The harbor maintenance tax should not be interpreted as a user fee in the face of a strong constitutional provision protecting exports from the burdens of taxation. A loophole should not be created for so-called user fees to circumvent the policy of the Constitution to protect exports. For many factual and legal reasons, this harbor funding measure is not a user fee:

Although we reject the proposition that this is a user fee, we state *arguendo* that the characteristics of user fees are not present for

[5]Duties. In its most usual signification this word is the synonym of imposts or customs; i.e. tax on imports; but it is sometimes used in a broader sense, as including all mannner of taxes, charges, or governmental impositions. *Blacks Law Dictionary*. 6th Edition.

this harbor maintenance device. Nor are the criteria for such fees met.[6]

1. This tax is not charged according to use. Ships entering the ports and benefiting from port facilities generate no tax when they enter or leave a harbor empty of any load. The empty ship uses the port and requires a dredged channel as much as the ship entering laden with cargo.

Then, this is a tax for "use" only when exports or imports are transported but not when other ship users are entering or leaving the ports. In short, this is a tax that burdens exports but does not necessarily charge for use of the port by ships unrelated to movement of cargo.

Initially an amended version of the bill would have imposed a lower rate of tax upon ships entering a port only for service or repairs, but this proposal did not turn up in the final bill that was enacted into law. S. Rep. No. 228, 99th Congress, 1st Sess., at 2. The law actually does not charge ships coming into port empty whether they are there for repairs or not. 26 U.S.C. §§4461-4462.

2. Users of the ports are not the only beneficiaries of harbor spending by the federal government. The U.S. population is, as reported

[6] *Massachusetts v. United States*, 435 U.S. 444, 98 S.Ct. 1153, 55 L.Ed. 2d 403 (1978): The court set forth several criteria for a valid user fee: (1) is nondiscriminatory; (2) represents a fair approximation of the cost of benefits received from the federal government; (3) is not excessive in relation to the cost of benefits supplied. Id. 98 S.Ct. at 1155-1156, and 435 U.S. at 445.

by Congress: "Moreover, the United States ports constitute and essential element of the Nation's transportation system, making possible the import and export of goods to the benefit of the entire population." *Report of the Committee on Public Works and Transportation with respect to the proposed Water Resources legislation in 1985*, H.R. Rep. No. 251, 99th, 1st Sess., part 1 at 5, *supra*.

3. The exporters do not directly use the ports any more than the population as a whole directly uses the port system. The vessel owners are the users of the ports and yet these users are not charged any taxes or fees pursuant to 26 U.S.C. § 4461. In short, those that use the ports are not taxed or charged while those exporters who do not directly use the ports are taxed. Given that the government has described this tax as a "user fee," it is not charged against the users. Congress had to reach out to these nonusers of the ports and did so only when their exports were loaded on ships and were in the stream of export commerce. That was a constitutional mistake under Article I, §9, Clause 5.

4. The HMT is an excessive charge against exporters. We have cited statistics in this brief that the government is raising much greater amounts of tax revenues from the exporters than is needed to carry on harbor maintenance and construction. *Infra* at 5-6.

5. The tax is charged on the <u>value</u> of cargoes in export commerce rather than according to use of harbor facilities. An empty ship entering the harbor pays nothing. A ship loaded with expensive technological equipment is charged much more than a shipload of rice or

wheat that uses the same size ship and same amount of port facilities but has a lower value. Senator Packwood's Senate Finance Committee apparently was under the impression that this fee was charged for use of the ports by vessels, when it stated: "The committee amendment imposes a charge on use by a commercial vessel of a harbor or channel ("port)") in the United States for loading or unloading of commercial cargo on or from the vessel. That provision did not become the basis of the law that taxed exporters according to value of shipments. S. Rep. No. 228, 99th Cong., 1st Sess., at 1.

The same report says that the bill would create "port user fees" and that these fees would be paid by the direct beneficiaries of such expenditures." *Id* at 5. The report again says that it is the use by commercial vessels that engenders the so-called "user fees."

In short, the legislative history of this legislation indicates that the members of Congress had some confusion about what they were passing into law as a harbor maintenance tax to be paid by exporters according to the value of cargo loaded, or whether they expected this HMT to be paid by the vessel owners that used the harbor facilities.

We need not address the question of whether this tax is discriminatory or not given that this Court has held for a long period of time and most recently in the *IBM* case, *supra*, that any tax placed on exported goods is a violation of the Constitution, Article I, §9, Clause 5, regardless of whether it is discriminatory or nondiscriminatory. *IBM*, supra, at 1797.

C. The Trust Fund created by the Harbor Maintenance Revenue Act of 1986 is not repository of revenues that can only be used for port maintenance; surplus revenue continues to accumulate.

We take exception to the government's argument that the tax is deposited in a trust fund and can only be withdrawn for use of maintaining and operating ports (Pet. Brief at13). The Water Resources Development Act, P.L. 99-662 and 26 U.S.C. § 9505(c), provides that in addition to certain harbor projects described in Section 210(a) of the act; the Department of the Treasury is permitted to spend up to $5 million and administration of the trust fund and harbor maintenance tax receipts. Additional funds may be spent "for payments of rebates of tolls or charges pursuant to section 13(b) of the act of May 13, 1954." §9505 (c)(2). (These are rebates of St. Lawrence Seaway tolls.).

D. Surpluses in the Trust Fund are escalating.

Moreover, the Trust Fund does not merely reflect the occasional surplus one year and deficits in other years depending on needs and proceeds received, as argued by the government (Pet. Brief at 17): The government's assertion that the level of funds required "fluctuates over time," is not supported by the facts on the record in this action. The record shows a constantly escalating production of surplus funds during the period 1989 through and including projected needs and revenues for 1999. Third Annual Report to Congress, supra at 3 and 5-6 (Record at 137, 139-140). Although surpluses

started modestly with $12,312,000 in the 1989 fiscal year, those surplus levels are projected to increase to $1.3 billion in the 1998 fiscal year and $1.66 billion in fiscal 1999. In short, this is not a record of "fluctuation," but instead is a constant escalation of surplus revenue generated by the harbor maintenance tax.

IV. THE IMPROPER EXERCISE OF TAXING POWER BY CONGRESS IN VIOLATION OF THE EXPORT CLAUSE HAS A GREATER IMPACT ON SMALL AND MEDIUM-SIZE BUSINESSES.

The larger companies, such as Texaco Refining and Marketing, Inc., Amoco Chemical Company, and E.I. Dupont de Nemours & Company, *amici* in the Federal Circuit Court,[7] have been exporting for a relatively long time and these are established multinational corporations. But a recent study by Federal Express shows that the small business are leading the growth in exporting that the United States economy has experienced for the past 10 years and is continuing.[8]: *The Journal of Commerce*, relying on the Federal Express study, said:

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7 List of Harbor Maintenance Tax Cases, Record at 80-84.

8 *Journal of Commerce*, Nov. 10, 1997, at 5a; and United Nations, *World Economic and Social Survey, 1997, Trends and Policies in the World Economy*, at 256; and U.S. Department of Commerce, *Statistical Abstract of the United States* (October 1997) at 807.

> Small businesses have become a driving engine of U.S. trade, and nearly all of them are expanding for five-year plans that will make them even bigger contributors to the economy...
>
> Small business exporters are an important component of the U.S. economy, and their growing participation in exports over the last decade--from fewer than 10% of all small manufacturers just five years ago to more than 18% today--has been spurred by changing technology and increasing expertise, some experts said.

THE JOURNAL OF COMMERCE, *Small Firms Drive Exports*, Nov. 10, 1997 at 5A.

The impact of taxing the exports of our client companies is to burden and discourage the most dynamic part of this country's exporting economy. In 1787 when the Export Clause was drafted there were no huge multinational companies like Texaco and Dupont. Companies were smaller in a nation of 3 million people and many of them were eager to trade and were actively engaged in trade.[9] It was just this type of export trade that the framers must have had in mind when they prohibited taxation of exports by the United States government.

Collectively the amount of harbor maintenance taxes paid by our clients, according

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[9] 2 FARRAND, *supra*, at 305-308, 359-364

to complaints filed in the Court of International Trade, is in approximately $335,000, representing the tax on $268 million in shipment value.[10] Although this amount may be a small percent of their total shipments during the past 3 3/4 years, this represents a burden that under the Article I §9, Clause 5 of the Constitution should not be imposed.

The tax has a relatively greater burden on small and medium size business, because the tax is a greater percentage of their total income and net income from exports than for large businesses. In short, the effect of the tax is to discourage exports, especially by small and medium-size businesses.

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[10] The firm represents the following plaintiffs in pending actions in the Court of International Trade (CIT) related to the test case of *United States v. United States Shoe Corporation*: Export Transports, Inc., Case No. 96-11-02567; Desert Whale Jojoba Company, Inc., No. 96-10-02354; OCI International Inc., No. 97-10-01737; C&D Technologies, Inc., No. 97-10-01887; Addison Wesley Longman, No. 97-11-02029; Schott Glass Technologies, Inc., No. 97-11-02000; Silbond Corporation, No. 97-11-02014; W.A. Baum Co., Inc. , 97-11-01968; Crews, Inc., No. 97-12-02075; and Al Zamil Co., Inc., No. 97-11-01978; Overseas Operations, Inc., No. 97-12-02153; and Universal Business Corporation, Case No. 97-12-02194.

V. CONGRESS IS NOT EMPOWERED BY THE COMMERCE CLAUSE TO VIOLATE THE EXPORT CLAUSE.

There is nothing in the Water Resources Development Act of 1986 applicable to harbors and Title XIV of the Act, known as the "Harbor Maintenance Revenue Act" that is regulatory. The pertinent portions of the act, codified in 26 §§4461, 4462 and 9505, simply impose a tax and provide for a method of collection as well as a Trust Fund repository of harbor maintenance revenue. Hence Congress's enactment of this legislation and its amendments was not a congressional exercise of regulatory power pursuant to the Commerce Clause of the Constitution, Article I, Section 8 ("To regulate Commerce with foreign Nationals, and among the several States, and with the Indian Tribes.")

Case law clearly acknowledges that Congress has great power over commerce, to tax, among its many powers; but there are certain limitations and restrictions built into the Constitution that delimit the exercise of Congressional power. The Export Clause is one of these few limits.

In *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1 (1824), Justice Marshall said of the commerce power, "It is the power to regulate." He said the commerce power "acknowledges no limitations, other than are prescribed in the Constitution." *Id.* at 196-197.

All of the cases cited in this brief in support of the Export Clause underline the limitation of commerce and taxing powers of Congress in the matter of placing burdensome taxes on exports.

VII. CONCLUSION

The judgment of the Court of Appeals for the Federal Circuit should be affirmed.

Respectfully submitted.

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